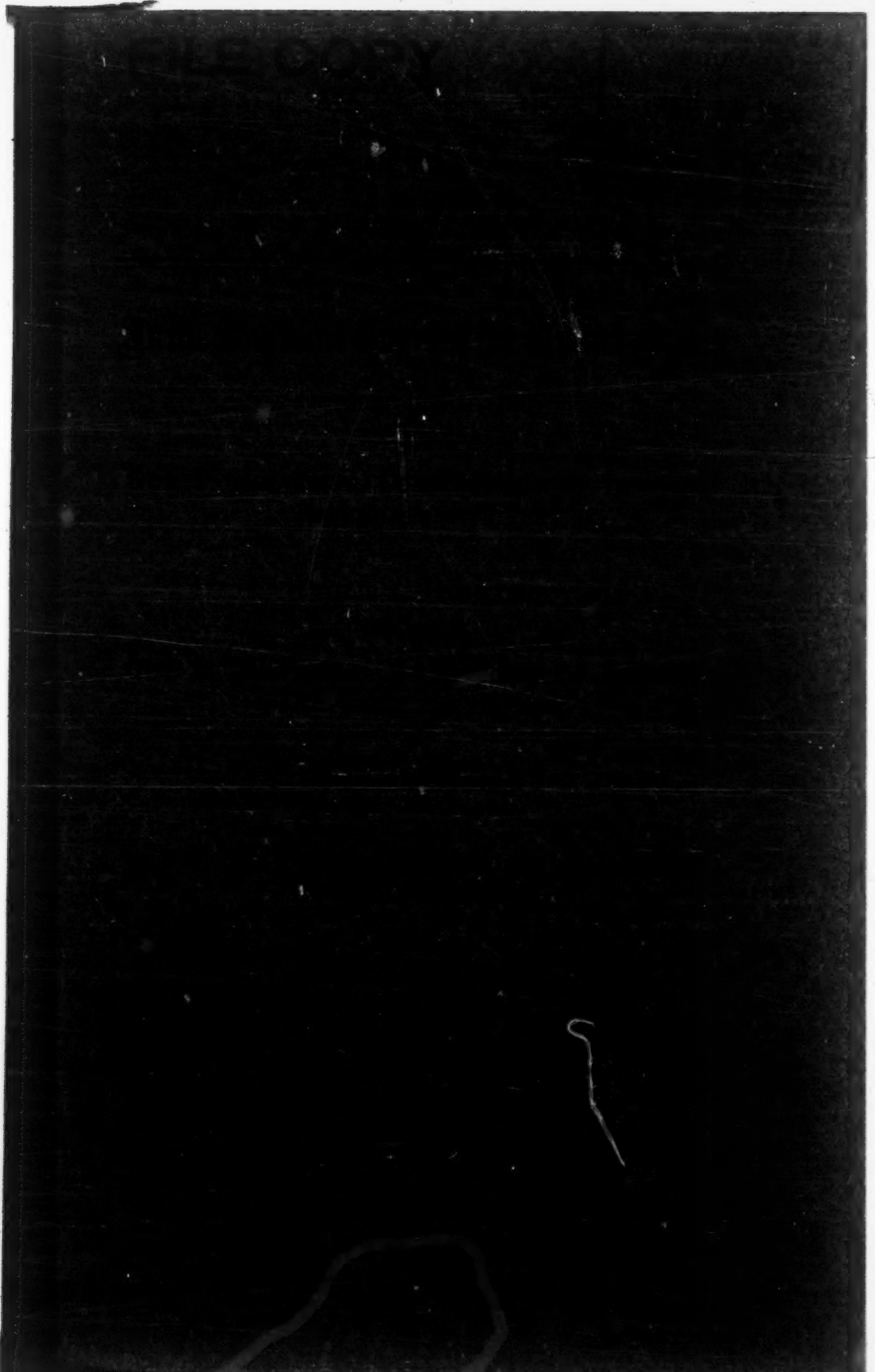


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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

v.

PHILIP L. GERHARDT

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

v.

BILLINGS WILSON

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

v.

JOHN J. MULCAHY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT

The Acting Solicitor General on behalf of Guy
T. Helvering, Commissioner of Internal Revenue,

prays that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Second Circuit entered in the above causes on November 10, 1937, affirming the decisions of the United States Board of Tax Appeals.¹

OPINIONS BELOW

The *per curiam* opinion of the Circuit Court of Appeals for the Second Circuit (R. 481) is reported in 92 F. (2d) 999. The findings of fact and opinion of the Board of Tax Appeals (R. 43-77) are reported in 34 B. T. A. 1229.

JURISDICTION

The judgments of the court below were entered on November 10, 1937 (R. 481-482). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the compensation received by the taxpayers for services performed during the respec-

¹ The cases involve the tax liability of three taxpayers. Five proceedings were begun before the Board of Tax Appeals. The cases were there consolidated and heard together. Three petitions for review were filed in the court below, which for purposes of record, briefing, hearing, argument, and decision were consolidated (R. 473-474). Accordingly, a single petition for certiorari is filed in this Court. Two petitions for review were filed in the Circuit Court of Appeals for the Third Circuit, but it has been stipulated that decision in those cases will abide the final decision in the instant cases.

tive years in issue, as employees of the Port of New York Authority, is exempt from Federal taxation on the ground that such a tax would be an unconstitutional burden on the States of New York and New Jersey.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 32-38.

STATEMENT

A. *The Establishment of the Port Authority*

The Port of New York Authority (hereinafter called Port Authority) is a bi-state corporation created by compact between the States of New York and New Jersey on April 30, 1921² (R. 44-45, 277), and confirmed by the Congress of the United States, by Joint Resolution of August 23, 1921, c. 77, 42 Stat. 174 (R. 45, 277).

This compact was made pursuant to the recommendation of a Joint Commission authorized by the legislatures of the two States and appointed by the governors of the States of New York and New Jersey, in 1917 (R. 280), for the purpose of surveying and investigating the transportation and terminal facilities and port and harbor conditions in and around the Port of New York (R. 47). This Joint Commission, after its survey, made a report to the legislatures of the two States in 1918, in which it

² Laws of New York, 1921, Vol. I, c. 154, p. 492; Laws of New Jersey, 1921, c. 151, p. 412.

recommended an interstate compact to provide a bi-state corporate agency to carry out a comprehensive port and harbor development under the direction of the two States (R. 47, 280, Ex. A.³). Subsequently, the Joint Commission, in 1919, having completed its survey, after reviewing the increasing commerce of the Port, the inefficiency of its terminal facilities, and the resulting hardship on the eight million inhabitants of the district, described the port problem as primarily a railroad problem and urged the adoption of an improvement plan comprising a complete reorganization of railroad terminal facilities, joint operation and connection of railway belt lines, pier improvements, the establishment of good distribution stations, warehouses, highways, and the like (R. 47-48, 280).

Thereafter a bi-state legislative commission was appointed to cooperate with the Joint Commission in revision of a tentative draft of a compact submitted by the Joint Commission in 1918 (R. 281), and in 1919 the Joint Commission, having completed its survey, presented to the legislatures and the governors of its respective States its "Joint Report with Comprehensive Plan and Recommendations" (R. 281; see Exhibit B). Thereafter, the legislatures of New York and New Jersey authorized certain Commissioners, on the part of the respective States, to execute an agreement or compact between the States, in the form set forth in the

³ References to exhibits are to the original exhibits filed with the Clerk of this Court.

Acts of the respective States. This was done and the compact approved by Congress (R. 283-284).

Pursuant to Article X of the Compact of April 30, 1921, and in accordance with the findings and recommendations of the Joint Commission, the legislatures of the two States adopted the Comprehensive Plan recommended by the Joint Commission for adoption by the two States (R. 286). The States embodied the Comprehensive Plan in Chapter 43 of the Laws of New York, 1922, and Chapter 9 of the Laws of New Jersey, 1922, and it was approved by Congress in Joint Resolution of July 1, 1922, c. 277, 42 Stat. 822 (R. 286; Exhibit E, pages 30 to 46).

The Comprehensive Plan provides in part as follows (R. 287):

SECTION 8. The port of New York Authority is hereby authorized and directed to proceed with the development of the port of New York in accordance with said comprehensive plan as rapidly as may be economically practicable and is hereby vested with all necessary and appropriate powers not inconsistent with the constitution of the United States or of either state to effectuate the same, except the power to levy taxes or assessments * * *. The port authority shall be regarded as the municipal corporate instrumentality of the two states for the purpose of developing the port and effecting the pledge of the states in said compact, but it shall have no power to pledge the credit of either state or to impose any obligation

upon either state or upon any municipality, except as and when such power is expressly given by statute, or the consent of any such municipality is given.

The compact, which recites that the objects sought are "a better coordination of the terminal, transportation, and other facilities of commerce in, about, and through the port of New York" confers upon the Port Authority the powers and jurisdiction stated as follows (Ex. E, pp. 19-20):

* * * to purchase, construct, lease, and/or operate any terminal or transportation facility within said district; and to make charges for the use thereof; and for any of such purposes to own, hold, lease and/or operate real or personal property, to borrow money and secure the same by bonds or by mortgages upon any property held or to be held by it. (Art. VI.)

and such additional powers as might thereafter be delegated to it by the legislatures of the two States or by Congress (Art. III).

Among the powers and restrictions imposed upon the Port Authority by the compact of April 30, 1921 (Ex. E), are the following: (1) It shall not pledge the credit of either State (Art. VII). (2) The facilities of the Authority are expressly subject to the jurisdiction and control of the public utilities commissions of either State to the same extent as a private corporation (Art. VIII). (3) Any municipality within the port district retains full power to develop its own port and terminal

facilities (Art. IX). (4) The Authority is to make plans for the development of the Port, but they must have the legislative approval of both States before becoming effective or binding on them (Art. XI). (5) The Port Authority may petition the legislatures of the two States, Congress, interstate commerce, and public utility commissions with respect to matters within its jurisdiction (Arts. XII, XIII). (6) Until its revenues are adequate, the legislature of the two States shall appropriate equal amounts (up to \$100,000 a year) for administrative expenses (Art. XV). (7) Subject to the authority of state and federal law, the Port Authority may prescribe rules for the improvement of navigation and commerce, which are binding only on approval of the legislatures of both states (Art. XVIII). (8) The right by the governor to veto the action of any commissioner appointed from his State is reserved (Art. XVI). (9) The two States (rather than the Authority) shall have power to provide or impose penalties for violation of its rules and regulations (Art. XIX).

Under the provisions of the Comprehensive Plan (Ex. E) the contemplated projects were as follows:

a. Railroad tunnel or tunnels connecting trans-continental railroad lines terminating in New Jersey, with the Long Island Railroad, the New York Connecting Railroad and the New York Central and New York, New Haven and Hartford Railroads in Brooklyn and the Bronx (1924 Report, p. 46; all annual reports were introduced as Exhibit G, R. 290).

b. A vehicular bridge or tunnel across the Arthur Kill River, connecting New Jersey and Staten Island (Ex. E, p. 36).

c. A bridge or tunnel from New Jersey to Manhattan, connecting New Jersey railroads with Manhattan railroads and providing for transportation of standard railroad cars into Manhattan (Ex. E, p. 37).

d. Railroad belt lines enumerated in the plan and terminal facilities in connection with an automatic electric system (Ex. E, p. 42).

The early operations and activities of the Port Authority, which it is not thought necessary to set out in detail here, appear from the stipulation of the parties (R. 276-472).

B. The Operations of the Port Authority

During the taxable years here in issue, 1932 and 1933, the activities of the Authority were as follows:

1. THE OPERATION OF BRIDGES AND TUNNELS

a. The Arthur Kill Bridges, known as Goethals Bridge and Outerbridge Crossing (R. 292-293).

These are interstate vehicular bridges, construction of which was begun in 1926 and completed in 1928 at a cost in excess of \$17,000,000 (R. 292), the Goethals Bridge being between Elizabeth, New Jersey, and Staten Island, New York, and Outerbridge Crossing being between Perth Amboy, New Jersey, and Tottenville, New York (R. 292).

These two bridges, from completion through the taxable years in issue here, were operated by the Authority with resulting surpluses or deficits as follows (R. 293):

1928 surplus.....	\$272, 676. 75
1929 deficit.....	23, 340. 21
1930 surplus.....	76, 683. 54
1931 surplus.....	40, 673. 37
1932 deficit.....	187, 272. 17
1933 deficit.....	295, 534. 46
1934 deficit.....	298, 851. 29

The deficits during 1932 and 1933 were due, according to the Authority's Annual Reports, in part to "general business depression seriously affecting the gross revenues," but "the larger portion of this decrease" was "due primarily to a further reduction in toll rates on the competing Perth Amboy Ferry" (1932 Report, pp. 51, 52; 1933 Report, p. 51). See also the 1930 Report, p. 54.

These bridges were operated in direct competition with the Perth Amboy Ferry and the opening of the bridges forced the Perth Amboy Ferry to reduce its toll charges, and in 1932 the opening of the Outerbridge Crossing Bridge forced a "further reduction in toll rates on the competing Perth Amboy Ferry" (1932 Report, pp. 51, 52).

The Tottenville and Elizabeth Ferries were both forced to reduce services after the construction of the two bridges (1929 Report, p. 46), and a ferry running between Carteret, New Jersey, and Staten Island, has gone out of business since the opening of these two bridges (1929 Report, p. 46).

b. The George Washington Bridge.

This interstate vehicular bridge over the Hudson River between Fort Lee, New Jersey, and the Borough of Manhattan, New York City, New York, was erected at a cost in excess of \$57,000,000, and was completed in 1931 (R. 295). During the taxable years in issue this bridge was operated by the Authority, with resulting net income from operations, prior to deductions for amortization, as follows (R. 296):

1931	-----	\$504,264.08
1932	-----	1,473,363.61
1933	-----	1,142,770.42
1934	-----	1,356,476.67

This bridge, as are the Goethals and Outerbridge Crossing bridges, is in competition with privately owned ferries which it affects in operations and revenues (1926 Report, pp. 14-16; R. 363, 365-366).

c. The Bayonne Bridge.

This is an interstate vehicular bridge over the Kill van Kull River, between Bayonne, New Jersey, and Port Richmond, Staten Island, New York. The bridge was opened to traffic on November 15, 1931, and was erected at a cost in excess of \$13,000,000 (R. 297-298). This bridge was operated by the Authority with a resulting annual net surplus or deficit as follows (R. 298-299):

1931 surplus	-----	\$25,400.29
1932 deficit	-----	101,466.11
1933 deficit	-----	240,890.18
1934 deficit	-----	163,848.67

* The surplus noted for the year 1931 resulted from the fact that interest on the funded debt of the bridge for that year was charged to the investment account, for the reason

This bridge, as are the previously mentioned bridges, is in competition with privately owned ferries and affects their revenues and has reduced their traffic and earnings (R. 363, 365-366).

In the operation of these bridges the Authority maintains, under state authority, a uniformed police force (R. 54).

d. Operation of the ~~Holland~~ Tunnel.

Subsequent to the construction by the New York Interstate Bridge and Tunnel Commission and the New Jersey Interstate Bridge and Tunnel Commission acting as a joint Commission, the Holland Tunnel was operated for a number of years by that Commission. These two Commissions were merged with the Authority in 1930, which was thus vested by the States of New York and New Jersey with the control, operation, and maintenance of the tunnel (R. 303-304). This interstate vehicular tunnel under the Hudson River between Jersey City, New Jersey, and the Borough of Manhattan, New York City, New York, was operated from the time of its acquisition by the Authority, at a net income as follows (R. 102):

1931 Net Income (Annual Report, p. 74)	\$3,031,987.89
1932 Net Income (Annual Report, p. 74)	2,605,076.96
1933 Net Income (Annual Report, p. 76)	2,440,987.15

As in the case of the George Washington, Bayonne, and Arthur Kill bridges, the operation

that although the bridge was opened for traffic on November 15, 1931, as aforesaid, the Commissioners of the Port Authority did not regard the construction program as completed until the end of the year 1931 (R. 299).

of the Holland Tunnel by the Authority is in direct competition with privately owned ferries across the Hudson River and has compelled the private ferries to reduce their toll charges and revenues (R. 363, 365-366).

e. The construction of an interstate vehicular tunnel under the Hudson River from Weehawken, New Jersey, to the Borough of Manhattan at 38th Street, to be known as the Midtown Tunnel, at an estimated cost in excess of \$37,500,000 (R. 308).

Upon completion this tunnel will compete with privately owned ferries and compel reduction in tolls with resulting loss in revenues to such privately owned ferries (R. 363, 365-366).

2. INTERSTATE BUS LINE

Since March 1, 1931, and through the taxable years in issue, the Authority has owned and operated with its own personnel an interstate bus line from Elizabeth, New Jersey, Port Richmond, Staten Island, and New York, over the Goethals Bridge (1934 Report, pp. 38, 39), and from the operation of this bus line the Authority derives income (R. 319).

3. COMMERCE BUILDING AND INLAND TERMINAL NO. 1

During the taxable years in issue, the Authority has been engaged in completing the construction of, and the operation of, the Commerce Building and Inland Terminal No. 1, some fifteen stories in height (R. 318, 348). Thirteen floors of the building

are devoted to commercial purposes. The street level floor and the basement are devoted to the purpose of the Inland Terminal and one floor, the second, has been devoted to exhibit purposes (R. 348). A portion of the street level floor is used as store area devoted to the conveniences of the building, on which are located a barber shop, a beauty shop, a cafeteria, a United States post office, and a bank, all of which are operated by commercial concerns except the United States post office, and all pay rents to the Authority for the space which they occupy (R. 349). The upper floors of this building are constructed in such manner as to be suitable for rental and occupancy for manufacturing, office and industrial business uses (R. 318). Revenue derived from the non-terminal portion of the building annually produces more income than that portion of the building devoted to the Authority's uses (R. 349). The building has no physical connection with any railroad facilities, nor with any dock, pier, wharf, or other marine facilities. All of the freight, both incoming and outgoing, is handled by trucks (R. 358). The basement of a large portion of this building was leased to eight railroads for use as a transfer terminal for a period of five years with options to renew the leases for nine additional five-year periods.

During the taxable years the Terminal operated at only a small fraction of its capacity of 680,000 tons (R. 349, 379), handling between fifty and seventy thousand tons a year (R. 379). The base-

ment of the building is occupied and used by the Railway Express Agency (R. 380). The Authority, in the operation of the Commerce Building and Inland Terminal No. 1, through rental agents, solicited and procured tenants for the building (R. 349-350). The building is at present 95% rented (R. 416). The Authority has carried on an active and extensive campaign in advertising the building in order to secure tenants (Ex. Q), in which it represented that while the building was designed primarily for industrial uses, it also had the advantages of an up-to-date office building (Exs. Q, P, A, N; R. 359). In the operation of the building the Authority comes into direct competition with the operation of privately owned buildings (R. 354). The space in the Commerce Building is divided as follows (1930 Report, p. 44; R. 348):

	<i>Square feet</i>
Office space.....	152,940
Manufacture and loft space.....	1,842,000
Freight terminal purposes.....	282,650
Stores.....	112,200

C. In General

All of the income, revenues, and receipts of the Authority have been derived from the following sources (R. 319): (a) Toll charges from bridges and tunnels;⁵ (b) Rentals of Inland Terminal No. 1, paid by the railroad carriers; (c) Income received from rentals received from the upper floors of Inland Terminal No. 1; (d) Rentals derived

⁵ All bridges and tunnels owned and operated by the Authority at all times up to and including the present time exact the payment of a toll charge by vehicles using them (R. 319).

from real estate purchased but not yet devoted to uses in connection with the Comprehensive Plan; (e) Interest from investments in sinking reserves and other funds; (f) Revenue from operation of bus line over Goethals Bridge; (g) Interest on bank balances; and (h) Miscellaneous income such as rental of telephone ducts, sales of gasoline, tire changes, and advances by the States, made under the provisions of the compact and Comprehensive Plan, until such time as the Port Authority is self-sustaining.

The Authority has made numerous studies of marine, railway, and highway traffic problems. It has induced the Federal Coast Guard to clear the harbor of ice. It has promulgated a regulation as to the storage period for railroad freight. It has advised municipalities in the district. (R. 62-63.)

The Authority's Annual Reports for the taxable years in issue show that the Port Authority expended in effectuation of the "Comprehensive Plan" the following sums: \$207,188.88 (1931 Annual Report, p. 89); \$189,575.35 (1932 Annual Report, p. 86); \$138,610.75 (1933 Annual Report, p. 84). It does not appear that any part of the funds expended by the Port Authority as above set out during the years in question was used to pay any part of the compensation of the respondents.

During the taxable years in issue the net income from the operation of the Authority's facilities was as follows (R. 66):

	* 1931 (74)	1932 (74)	1933 (75)
Operating revenue (tolls, etc.).....	\$7,367,288.39	\$6,197,799.49	\$9,755,245.91
Net income.....	3,602,325.63	2,605,076.96	3,112,953.78

* Figures in parenthesis indicate page in respective Annual Report where figures are found.

All of the operating revenues and tolls of the Port Authority derived from its various facilities are specifically pledged as security for the payment of its outstanding bonds and obligations, which pledge constitutes a lien upon such revenues and tolls (Ex. E, pp. 49, 73, 296; 1931 Report, pp. 57-58). The Port Authority has authority under the compact to mortgage its facilities and other property now held or to be acquired by it if it so desires (Art. VI).

There is no provision or saving clause in the compact, Comprehensive Plan or any of the statutes of either State dealing with the Port Authority which provides for its final liquidation or dissolution or for the reversion of its properties and facilities to either or both of the two States.

The Authority is expressly prohibited from levying any taxes or assessments (Ex. E, p. 43). All penalties for violation of its rules for its facilities must be enacted by the legislatures of the two States and must be enforced in the regularly established courts of the two States (Compact, Art. XIX). All transportation facilities of the Port Authority are expressly subject to regulation

by the Public Service Commission of both States to the same extent "as if such * * * facility were owned, leased, operated or constructed by a private corporation" (Compact, Art. VIII).

All of the bridges and tunnels owned and operated by the Port Authority are interstate in character, and hence are subject to the power of Congress over such commerce under the Constitution of the United States. The rules and regulations of the Port Authority as to its bridges and tunnels over navigable waters are expressly made subject to the power of Congress over such facilities (Compact, Art. XXII).

The operations and activities of the Port Authority during the years in question were in connection with its facilities. It has not undertaken any projects to develop the harbor of New York in any way. It has never dredged a channel and has no dredges or facilities to do so (R. 464). It neither owns, leases, operates, nor has it constructed or improved for its own use any piers, docks, wharves, slips or pier terminals (R. 463). It does not own or operate any tugs, barges, or marine equipment which could be used for the improvement or conduct of navigation (R. 463-464). It has established no harbor markings, buoys, lights, bells, or any other means for improving navigation, nor has it issued rules or regulations affecting navigation or commerce, except in connection with lights on its own bridges (R. 465).

The facilities constructed and operated by the Authority were financed principally by bond issues. Approximately 90% of the funds needed by the Authority were provided by such issues. The financing afforded by the States of New York and New Jersey was approximately 10% of the Authority's needs and such sums as were advanced by the two States were not invested by the States in the enterprise, but were merely loaned to the Authority and must be repaid to the two States (R. 308-309).

The amounts derived by the Authority for its several projects by advances from the States or by bond issues are as follows:

	States loan	Bond issue
Arthur Kill Bridges.....	\$4,200,000	¹ \$14,000,000
George Washington Bridge.....	9,800,000	² 50,000,000
Bayonne Bridge.....	4,100,000	³ 12,000,000
Holland Tunnel.....	None	⁴ 50,000,000
Commerce Building Inland Terminal.....	None	⁴ 16,000,000
Total.....	18,100,000	142,000,000
Add: Midtown Tunnel construction.....	400,000	⁵ 37,500,000
Total.....	18,500,000	179,500,000

¹ R. 291, 292.

² R. 295.

³ R. 296.

⁴ 1931 Annual Report, p. 57; 1932 Annual Report, p. 54.

⁵ R. 306-307, 308.

Of the advances made, settlement of the State of New Jersey's advances of \$4,500,000 was made by the issue of \$2,500,000 bonds, thus reducing the advances by the States to \$14,000,000 and increasing the bond total to \$182,000,000.

D. The Taxpayers

The three taxpayers, during the taxable years in issue, were employees of the Authority (R. 338, 368, 461). The taxpayer Gerhardt was employed with the title of Industrial Consultant at a salary of \$8,500 a year and during the taxable year 1933 received a salary of \$8,137.50 (R. 338). He was employed from May 16, 1931, throughout the taxable years in issue.

The taxpayer Wilson was employed as Assistant General Manager of the Authority and received a salary of \$14,625 for the year 1933 (R. 367-368). The taxpayer Wilson was employed by the Authority throughout the taxable years in issue (R. 368).

The taxpayer Mulcahy was employed by the Authority during the year 1932 as Assistant General Manager of the Authority and received a salary of \$10,950 for that year (R. 461).

The three taxpayers are citizens of the United States and residents of New York (R. 219, 237, 255).

E. The Proceedings Below

The Board of Tax Appeals held (R. 72-77) that the Authority was engaged in the performance of a sovereign function of each of the two States of New York and New Jersey and that the compensation received by the three taxpayers during the taxable years here in issue was constitutionally immune from income tax and entered its decisions accordingly.

The court below, in a *per curiam* opinion, affirmed the decisions of the Board of Tax Appeals on the authority of *Commissioner v. Ten Eyck*, 76 F. (2d) 515 (C. C. A. 2d); *New York ex rel. Rogers v. Graves*, 299 U. S. 401; and *Brush v. Commissioner*, 85 F. (2d) 32 (C. C. A. 2d).⁷

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the functions exercised by the Port of New York Authority during the years in question were governmental functions of the States of New York and New Jersey.

2. In failing to hold that in the operation of its several facilities the Port Authority was performing proprietary functions of the States of New York and New Jersey.

3. In holding that the Port Authority functioned as an agency of the States of New York and New Jersey in the exercise by those States of their sovereign powers.

4. In failing to hold that since the Port Authority functioned under a compact between the States of New York and New Jersey, subject at all times to the consent of the Federal Government, the Port Authority was not engaged in the performance of sovereign functions of the two States such as to be immune from taxation.

⁷ Petitioner is of opinion that *Brush v. Commissioner*, 300 U. S. 352, was intended by the court below as authority, since *Brush v. Commissioner*, 85 F. (2d) 32, was reversed in that case.

5. In extending the principle of tax immunity to state functions in the field of interstate commerce, supreme authority over which has been granted to the Federal Government under the Constitution.

6. In holding that the compensation received by the taxpayers for services rendered during the taxable years in issue as employees of the Port Authority was constitutionally immune from Federal income tax.

7. In affirming the decisions of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRITS

This petition presents several questions of constitutional law which are of the first importance. In addition, a decision by this Court is necessary finally to put at rest a controversy which has plagued both the Federal taxing authorities and the Port Authority, and an answer to which is necessary to point the way to a disposition of the tax questions which are accumulating about the growing use by States of commissions and authorities, often interstate in nature, to perform functions analogous to those of the Port Authority. The questions which require decision are: (1) whether the activities of the Port Authority are proprietary or governmental in nature; (2) whether the Port Authority and its employees can be said to be immune from Federal taxation in view of the fact that the Authority was created by and functions under an interstate compact approved by Congress; (3)

whether the Port Authority and its employees are immune from Federal taxation in view of the paramount power of the Federal Government over interstate commerce; and (4) whether, if the Port Authority itself is immune from Federal taxation, this immunity operates to exempt its employees from a non-discriminatory income tax.*

1. THE ACTIVITIES OF THE PORT AUTHORITY ARE
PROPRIETARY

The Port Authority is engaged in some activities, such as the maintenance of a police force on its projects, which are concededly governmental in nature. Other activities, such as the operation of a bus line and the erection and operation of a commercial office and terminal building, are just as clearly proprietary in character. But the great bulk of its functions fall into a somewhat more debatable area. This is the construction and operation of its great toll bridges and tunnels. These activities seem to the petitioner to be clearly proprietary in character under the decision in *Helvering v. Powers*, 293 U. S. 214. No reason appears why the operation of an elevated railway should be proprietary while the operation of a toll bridge or tunnel should be governmental in nature. It is recognized that, if *Brush v. Commissioner*, 300 U. S.

* It is not contemplated that it will be necessary to urge this last question. It is set out in this petition to guard against any thought that the Government has conceded, or has foregone its right to raise, the issue.

352, were extended sufficiently, its implications might be thought to weaken the authority of *Helvering v. Powers*. But the Government does not so read the case and submits that the decision of the court below raises a question which should be decided by this Court.

Related to this question is the manner in which a great enterprise such as the Port Authority is to be treated when some of its activities are governmental and others are proprietary. *New York ex rel. Rogers v. Graves*, 299 U. S. 401, 407-408, implies that the question is one as to whether the enterprise is primarily or predominantly either governmental or proprietary. Certainly, the Port Authority—a great commercial enterprise in the sense that it derives millions of dollars of revenue in competition with private operators—should not be granted a complete tax immunity merely because an inconsiderable part of its activities may be said to be governmental in character.⁹

This case presents in clear focus the necessity for the application of the principle so frequently announced by this Court that the doctrine of inter-

⁹ It is unnecessary at this stage of the proceedings to enter into controversy with respondents as to whether the functions of the Port Authority in planning the harbor development and traffic flow is governmental or proprietary in nature. It may be supposed that similar work is done alike by the governments involved, the local chambers of commerce, and the large railroads. However this may be, the great bulk of the Authority's activities remain the construction and operation of bridges, tunnels, and the terminal building.

governmental tax immunity is not to be so applied as to cripple the taxing power. *Willcuts v. Bunn*, 282 U. S. 216, 225; *James v. Dravo Contracting Co.*, No. 3, present Term. In particular, it calls for application of the rule that the States cannot withdraw sources of Federal revenue by engaging in activities to which the Federal taxing power would normally reach. *South Carolina v. United States*, 199 U. S. 437; *Ohio v. Helvering*, 292 U. S. 360, 368-369; *Helvering v. Powers*, *supra*; *United States v. California*, 297 U. S. 175, 184-185. During each of the taxable years in question the Port Authority derived between \$6,200,000 and \$9,750,000 in gross operating revenues (*supra*, p. 16). It is probable that not all of these revenues were drained from its private competitors, but it is obvious that, if the Port Authority and its employees are exempt from Federal taxation, an important source of Federal revenue has vanished.

2. THE PORT AUTHORITY IS NOT AN AGENCY OF THE STATES ALONE

The Port Authority was created by and operates under a compact between the States of New York and New Jersey which was approved by an Act of Congress (*supra*, p. 3). Without this approval of Congress, the compact would have been inoperative and the Port Authority would not have been created.

In the memorandum filed on behalf of the Attorney General in *Hinderlider v. La Plata River and*

Cherry Creek Ditch Co., No. 437, present Term, there are set out the considerations which serve to demonstrate that such a compact has the status of an Act of Congress. See *Pennsylvania v. The Wheeling Bridge Co.*, 13 How. 518, 566; *Missouri v. Illinois*, 200 U. S. 496, 519; *Wedding v. Meyler*, 192 U. S. 573, 581. Under this view the Port Authority is created under an Act of Congress and certainly cannot be said to be an instrumentality of the States such that taxation of its employees by the United States is forbidden by the Constitution. This status seems recognized in the compact itself. Not only did the Act of Congress reserve the right to alter, amend, or repeal the approving resolution, but the compact gave to the Port Authority such additional powers as shall be conferred on it by the two legislatures or by Congress (Art. III).

Even if a compact which has been approved by Congress should be viewed as something less than an Act of Congress, the fact remains clear that under Article I, Section 10, clause 3, of the Constitution it has life only through the participation of Congress. Since the United States by express direction of the Constitution is given the absolute power to determine whether or not the compact shall be made and the Port Authority created, it seems quite impossible that taxation of the Port Authority employees by the United States should represent an unconstitutional threat to the necessary independence of the States of New York and New Jersey.

The court below, in affirming the Board's decision (R. 74-75) that the Port Authority is a sovereign instrumentality the employees of which are immune from Federal taxation, has applied the doctrine of tax immunity mechanically and in a situation where its reasons are absent. The reason for that rule "is found in the necessary protection of the independence of the national and state governments," *Helvering v. Powers*, 293 U. S. 214, 225, and, "Springing from that necessity it does not extend beyond it." *Board of Trustees v. United States*, 289 U. S. 48, 59. Even if it be assumed that the necessary independence of the State is threatened by a Federal income tax upon a state employee, it cannot be thought that an agency which is dependent upon Congress for its very existence has a similar claim to independence of the Federal Government. Since the Port Authority has no such independence of the United States, the reason for the rule of tax immunity is absent.

3. THE PORT AUTHORITY OPERATES IN INTERSTATE COMMERCE, SUBJECT TO THE PARAMOUNT POWER OF CONGRESS

Apart from the fact that the Port Authority ~~was~~ created by a compact requiring the consent of Congress, it seems evident that it cannot claim a constitutional independence of the United States in view of the fact that almost all of its activities are in or directly affect interstate and foreign commerce.

In the Joint Resolution of August 23, 1921 (c. 77, 42 Stat. 174), consenting to the compact creating the Port Authority, it was provided "That nothing therein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement" and that "the right to alter, amend, or repeal this resolution is hereby expressly reserved." Similar qualifications, with the additional proviso that no bridges or tunnels should be erected across or under waters of the United States except with the approval of the Secretary of War and the Chief of Engineers, were made in the Joint Resolution consenting to the execution of the Comprehensive Plan (c. 277, 42 Stat. 822, 826). The compact itself subjected the rule making power of the Port Authority "to the exercise of the power of Congress, for the improvement of the conduct of navigation and commerce" (Art. XVIII). The interstate bridges could be constructed only with the consent of Congress, and in each of the three consents Congress expressly provided that the bridges should be subject to the Act of March 23, 1906, regulating the construction of bridges over navigable waters (Acts of March 2, 1925, c. 389-391, 43 Stat. 1094-1095). Under the terms of this Act, *inter alia*, the Secretary of War and the Chief of Engineers must approve the location and the plans of the bridge, the Secretary of War may regulate the toll rates, and he may even, after notice and hearing, direct the removal of the bridge if it be

found to be an unreasonable obstruction to navigation or if the lawful orders of the Secretary or the Chief of Engineers are disobeyed. (Act of March 23, 1906, c. 1130, 34 Stat. 84; U. S. C., Title 33, Secs. 491-498.)

It seems quite plain that the bridges of the Port Authority are completely subject to the paramount Federal authority. Similarly, its interstate tunnels are obviously within the field of interstate commerce, granted to Congress by the Constitution. There can be no doubt that the bus line operated by the Authority over its interstate bridges, and its terminal facilities so far as used for interstate shipments, are similarly subject to whatever appropriate control Congress should think necessary in its regulation of interstate commerce. The functions of the Port Authority in planning the development of the Port of New York are, of course, within a field of control wholly subject to the power of Congress. *Wisconsin v. Duluth*, 96 U. S. 379, 387; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 634-638.

The Government does not argue that the tax in question is an exercise of the power to regulate interstate commerce. It does contend that, since the United States is supreme in this field, the implications of the Constitution do not assure to the States, when they act in this field, that they shall be independent of and immune from the effect of operation of the Federal Government. If the Constitution does not assure the States, acting in this capacity, of their independence of the United

States, then there is no basis for the claim of tax immunity and it must fall (see *supra*, p. 26).

4. THE IMPORTANCE OF THE QUESTIONS

It is unnecessary to underscore the importance of the issues presented by this case. This Court has never passed on any of the three contentions which have been outlined above. In each of these questions the Government feels its position to be sound. Unless this Court settles the matter there will be protracted litigation throughout the various circuits. Whether the Government or the court below should ultimately be proved to be correct, there will have been much litigation and much uncertainty before the issue is finally resolved. If our views should ultimately be upheld in a later case, there will, in addition, have been lost substantial annual revenues improperly withheld from the Federal taxing power by the decision of the court below.

It is recognized that there is no conflict of decisions, and that the Board of Tax Appeals and another Circuit Court of Appeals have held against the Government, in cases more or less analogous to this. *Moisseiff v. Commissioner*, 21 B. T. A. 515 (Port Authority employee); *Carey v. Commissioner*, 31 B. T. A. 839 (employee of New Jersey Interstate Bridge Commission); *Commissioner v. Harlan*, 80 F. (2d) 660 (C. C. A. 9th) (employee of Golden Gate Bridge and Highway District); *Commissioner v. Ten Eyck*, 76 F. (2d) 515 (C. C. A. 2nd) (chairman of Albany Port District). But it seems plain that these decisions are not so evidently

correct that the important questions of constitutional law presented in this petition can be taken to be settled.¹⁰

We have no precise information as to the number of port, harbor, and bridge organizations that are affected by the questions presented in this case. The American Association of Port Authorities, in a brief filed *amicus curiae* in the court below listed established organizations or boards in 29 ports and 4 state-wide organizations which were members of its association. Recent compacts approved by Congress have authorized the creation of at least 7 commissions with functions more or less similar to those of the Port Authority.¹¹ It is evident that the question is one of first importance.

¹⁰ It may be noted that respondents in the court below attacked the Government's failure to secure a final decision by this Court in the cases cited above and stated that the persistent "attacks" by the Bureau of Internal Revenue were a danger "not only to the stability of the Port Authority, but also to similar state agencies" and that "Such attacks are destroying that certainty which is the essence of a government of laws" (Br. 4-7).

¹¹ The Palisades Interstate Park Commission, Act of August 19, 1937, c. 706, 50 Stat. 719; The Buffalo and Fort Erie Public Bridge Authority, Act of May 3, 1934, c. 196, 48 Stat. 662; Lake Champlain Bridge Commission, Act of Feb. 16, 1928, c. 87, 45 Stat. 120, amended Act of August 23, 1935, c. 625, 49 Stat. 736, and Act of June 4, 1936, c. 504, 49 Stat. 1472; The Delaware River Joint Toll Bridge Commission Act of August 30, 1935, c. 833, Sec. 9, 49 Stat. 1058; Niagara Frontier Bridge Commission, Act of June 17, 1930, c. 499, 46 Stat. 764; Interstate Sanitation Commission, Act of Aug. 27, 1935, c. 779, 49 Stat. 932; and Potomac Valley Conservation District, Act of Aug. 31, 1937, c. 891, 50 Stat. 884.

Wherefore, it is respectfully submitted that this petition for writs of certiorari should be granted.

GOLDEN W. BELL,
Acting Solicitor General.

FEBRUARY 1938.

APPENDIX

Act of March 3, 1899 (Rivers and Harbors Act),
c. 425, 30 Stat. 1121:

SEC. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further*, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War. (U. S. C., Title 33, Sec. 401.)

Act of March 23, 1906 (General Bridge Law of 1906), c. 1130, 34 Stat. 84:

SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That when, hereafter, authority is granted by Congress to any persons to construct and maintain a bridge across or over any of the navigable waters of the United States, such bridge shall not be built or commenced until the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of War and Chief of Engineers for their approval, nor until they shall have approved such plans and specifications and the location of such bridge and accessory works; and when the plans for any bridge to be constructed under the provisions of this Act have been approved by the Chief of Engineers and by the Secretary of War it shall not be lawful to deviate from such plans, either before or after completion of the structure, unless the modification of such plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War. (U. S. C., Title 33, Sec. 491.)

SEC. 2. That any bridge built in accordance with the provisions of this Act shall be a lawful structure and shall be recognized and known as a post route, upon which no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States than the rate per mile paid for the transportation over any railroad, street railway, or public highway leading to said

bridge; and the United States shall have the right to construct, maintain, and repair, without any charge therefor, telegraph and telephone lines across and upon said bridge and its approaches; and equal privileges in the use of said bridge and its approaches shall be granted to all telegraph and telephone companies. (U. S. C., Title 33, Sec. 492.)

SEC. 4. That no bridge erected or maintained under the provisions of this Act shall at any time unreasonably obstruct the free navigation of the waters over which it is constructed, and if any bridge erected in accordance with the provisions of this Act shall, in the opinion of the Secretary of War, at any time unreasonably obstruct such navigation, either on account of insufficient height, width of span, or otherwise, or if there be difficulty in passing the draw opening or the drawspan of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the Secretary of War, after giving the parties interested reasonable opportunity to be heard, to notify the persons owning or controlling such bridge to so alter the same as to render navigation through or under it reasonably free, easy, and unobstructed, stating in such notice the changes required to be made, and prescribing in each case a reasonable time in which to make such changes, and if at the end of the time so specified the changes so required have not been made, the persons owning or controlling such bridge shall be deemed guilty of a violation of this Act; and all such alterations shall be made and all such obstructions shall be removed at the expense of the persons owning or operating said bridge. The persons owning or operating any such bridge shall maintain, at their own expense, such lights and other signals

thereon as the Secretary of Commerce and Labor shall prescribe. If the bridge shall be constructed with a draw, then the draw shall be opened promptly by the persons owning or operating such bridge upon reasonable signal for the passage of boats and other water craft. If tolls shall be charged for the transit over any bridge constructed under the provisions of this Act, of engines, cars, street cars, wagons, carriages, vehicles, animals, foot passengers, or other passengers, such tolls shall be reasonable and just, and the Secretary of War may, at any time, and from time to time, prescribe the reasonable rates of toll for such transit over such bridge, and the rates so prescribed shall be the legal rates and shall be the rates demanded and received for such transit. (U. S. C., Title 33, Sec. 494.)

SEC. 8. That the right to alter, amend, or repeal this Act is hereby expressly reserved as to any and all bridges which may be built in accordance with the provisions of this Act, and the United States shall incur no liability for the alteration, amendment, or repeal thereof to the owner or owners or any other persons interested in any bridge which shall have been constructed in accordance with its provisions. (U. S. C., Title 33, Sec. 498.)

Joint Resolution of August 23, 1921, c. 77, 42 Stat. 174:

Joint Resolution Granting consent of Congress to an agreement or compact entered into between the State of New York and the State of New Jersey for the creation of the Port of New York District and the establishment of the Port of New York Authority for the comprehensive development of the port of New York.

Whereas commissioners duly appointed on the part of the State of New York and commissioners duly appointed on the part of the State of New Jersey for the creation of the Port of New York District and the establishment of the Port of New York Authority for the comprehensive development of the port of New York, pursuant to chapter 154, Laws of New York, 1921, and chapter 151, Laws of New Jersey, 1921, have executed certain articles, which are contained in the following, namely:

* * * * *

[Here follows the text of the compact.]

And

Whereas the said agreement has been signed and sealed by the commissioners of each State, and has thereby become binding on the two States as provided in the aforesaid acts: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby given to the said agreement, and to each and every part and article thereof: Provided, That nothing therein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement.

SEC. 2. That the right to alter, amend, or repeal this resolution is hereby expressly reserved.

Approved August 23, 1921.

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived

from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

Revenue Act of 1932, c. 209, 47 Stat. 169:

Section 22 (a) of the Revenue Act of 1932 is identical with Section 22 (a) of the Revenue Act of 1928, *supra*.

Regulations 74:

ART. 51. *What included in gross income.*—Gross income includes in general compensation for personal and professional services, business income, profits from sales of and and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. * * *

ART. 643. *Compensation of State officers and employees.*—Compensation paid to its officers and employees by a State or political subdivision thereof for services rendered in connection with the exercise of an essential governmental function of the State or political subdivision, * * * Compensation received for services rendered to a State or political subdivision thereof is included in gross income unless (a) the person receives such compensation as an officer or employee of a State or political subdivision; and (b) the services are rendered in connection with the exercise of an essential governmental function. * * *

Regulations 77:

Article 51 is identical with Article 51 of Regulations 74, *supra*.

Article 643 is identical with Article 643 of Regulations 74, *supra*.

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